

Letter of Findings: 07-0329
Sales and Use Tax
For the Years 2004, 2005, 2006

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ISSUES

I. Sales and Use Tax – Consignment Sales of Watercraft.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-3-6; IC § 6-2.5-4-12; IC § 6-8.1-5-1; IC § 6-2.5-9-3; IC § 9-31-3-1; IC § 9-31-3-3; [45 IAC 2.2-4-33](#); Sales Tax Information Bulletin 20 (May 2007); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of sales tax on certain watercraft sold on consignment by Taxpayer.

II. Sales and Use Tax – Duty to Collect – Valid Exemption Certificate.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-8-8; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of sales tax on some transactions where the buyer presented exemption certificates.

III. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an S Corporation operating a boat retail and service business. Services provided by Taxpayer include winterizing, oil changes, fluid top offs, boat storage, and consignment services.

As a result of a sales and use tax audit for the years 2004, 2005, and 2006, Taxpayer was assessed additional sales and use tax, penalty, and interest. Taxpayer protested the imposition of tax on consignment sales and certain other sales that Taxpayer argued were exempt. A hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Consignment Sales of Watercraft.

DISCUSSION

Taxpayer was the facilitator (consignee) in some consignment sales of watercraft for which Taxpayer received a commission. The Department's audit report found that Taxpayer did not collect sales tax on some or most of these consignment sales, so consequently assessed additional sales tax, interest, and penalty.

All tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b), (c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayer protests that during the years at issue it had been told repeatedly by local Bureau of Motor Vehicle ("BMV") branches that it should not collect sales tax on consignment sales because it was not the owner of the watercraft that were sold in those transactions and which were then being titled and registered at the BMV. According to Taxpayer, the BMV insisted to Taxpayer that the BMV collected the sales tax. Taxpayer had been previously audited by the Department and the same issue had arisen in the prior audit where the Department told Taxpayer that it must collect sales tax on the consignment transactions (Taxpayer went through the Amnesty Program to handle the previous audit-generated liability). Taxpayer complains that when it complied with the Department's directive and collected sales tax on consignment sales from its customers, its customers invariably had to double pay the tax at the BMV and then come back to Taxpayer for a refund of the sales tax. Taxpayer complains that it had received contradictory direction from two state agencies over the course of several years.

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a).

IC § 6-2.5-1-2(a) defines a "retail transaction" to mean:

"Retail transaction" means a transaction of a retail merchant that constitutes selling at retail as described in [IC 6-2.5-4-1](#), that constitutes making a wholesale sale as described in [IC 6-2.5-4-2](#), or that is described in any other section of [IC 6-2.5-4](#).

Additionally, IC § 6-2.5-9-3(2) provides:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

Accordingly, every person in the business of making sales on consignment is a retail merchant receiving gross retail income that is subject to sales tax and is responsible for collecting that sales tax.

The Department also points Taxpayer to Sales Tax Information Bulletin 20 (May 2007) which states under Part IV that "[t]he sale of consigned tangible personal property is a retail sale and the consignee must register as a retail merchant and must collect and remit sales tax."

Therefore, Taxpayer, as the consignee, unquestionably has a statutory obligation to collect and remit sales tax on the consignment sales.

Under IC § 9-31-3-1, "[E]very motorboat principally used on the waters of Indiana must be registered and numbered" with the Indiana Bureau of Motor Vehicles ("BMV"). But, there is no authority under Title 9 for the BMV to collect sales tax. The only tax the BMV is authorized to collect on watercraft transactions is the use tax. IC § 9-31-1-3 states, the BMV "shall receive payments of the use tax on watercraft that is required by [IC 6-2.5-3-2](#) and [IC 6-2.5-3-6](#)." (Emphasis added). Indeed, IC § 6-2.5-3-2(b) imposes use tax on the storage, use, or consumption of watercraft in Indiana if the property is acquired in an isolated or occasional transaction and is required to be titled, licensed or registered in Indiana, and if, according to IC § 6-2.5-3-4, sales tax has not already been paid on the acquisition of the watercraft or it is otherwise exempt from sales and use tax. IC § 6-2.5-3-6(d) authorizes the BMV to collect this use tax.

The circumstances at the BMV likely result from the particular ST-108 form (a dealer form) that Taxpayer fills out and gives to its customers. Those customers then in turn submit to the BMV that form causing a data entry and payment processing conflict since Taxpayer in this instance is acting as a consignee and not a dealer who had owned the watercraft.

Taxpayer must understand, however, that this does not remove its obligation to collect and remit to the Department the sales tax on these consignment transactions. Taxpayer would be better served simply giving each of its consignor customers the invoice that shows sales tax was paid to consignee (i.e., Taxpayer) with a clear notation on the invoice that the item was a "consignment sale by [Taxpayer] on behalf of [seller] to [buyer]."

After the hearing, Taxpayer presented invoices for consignment sales for the years at issue which show that for some transactions Taxpayer did not charge sales tax, and for some transactions Taxpayer did charge a sales tax. For most of those transactions where Taxpayer charged a sales tax, the invoices have a handwritten notation to the effect that a refund was made because BMV charged the tax on the transaction. Taxpayer's record-keeping, however, did not present documentation of these "refunds" of sales tax; i.e., apart from the handwritten notation, no additional documentation was presented to show that the sales tax was refunded to its customers or that these same customers actually paid the sales tax to the BMV.

Taxpayer has not met its burden to prove that the Department's assessment of additional sales tax on consignment sales was incorrect.

FINDING

Taxpayer's protest is respectfully denied.

II. Sales and Use Tax – Duty to Collect – Valid Exemption Certificate.

DISCUSSION

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b), (c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayer seeks adjustments to the assessed tax based on information that was unavailable during the original audit review that was later provided by Taxpayer. Taxpayer protests the imposition of sales tax on the sales of certain items alleging that the Department assessed sales tax for sales for which Taxpayer had collected a valid Indiana exemption certificate.

Indiana imposes a sales tax on retail sales of tangible personal property in Indiana. The sellers of the property are required to collect the sales tax from the purchasers and remit that tax to the state unless the sale qualifies for a statutory exemption. IC § 6-2.5-2-1.

IC § 6-2.5-8-8(a) provides for exemption certificates from sales tax as follows:

A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax.

The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

(Emphasis added).

Taxpayer provided some exemption certificates, which are included in its file. A supplemental audit will determine if these exemption certificates relate to transactions for which the Department's audit report assessed additional sales tax.

FINDING

Taxpayer's protest is sustained pending confirmation by a supplemental audit.

III. Tax Administration - Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and ten percent negligence penalties for the tax years in question. Taxpayer protests the imposition of the penalties. The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides "if a person... incurs, upon examination by the department, a deficiency that is due to negligence... the person is subject to a penalty."

The Department refers to [45 IAC 15-11-2\(b\)](#), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2\(c\)](#), as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, taxpayer incurred a deficiency which the Department determined was due to negligence under [45 IAC 15-11-2\(b\)](#), and so was subject to a penalty under IC § 6-8.1-10-2.1(a).

Taxpayer had a statutory obligation to maintain its records in such a fashion that the Department could properly assess tax on Taxpayer's business activities. For the years at issue, Taxpayer failed to maintain proper records. Nonetheless, Taxpayer has demonstrated that in substantial part its non-collection of sales tax on consignment sales was due to reasonable cause.

FINDING

Taxpayer's protest is sustained.

CONCLUSION

Taxpayer is denied on its protest of the assessment of sales tax on its consignment sales.

Taxpayer is sustained on its protest of the assessment of sales tax for those transactions for which it presented exemption certificates pending confirmation by supplemental audit that those transactions were actually assessed sales tax.

Taxpayer is sustained on its protest of the penalty.

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